

OGC Has Reviewed

30 January 1951

MEMORANDUM FOR MR. HOUSTON

SUBJECT: Office of Censorship

1. You have requested an opinion concerning authority to create or revive an Office of Censorship, and the steps necessary for such a move.

2. The Office of Censorship was created by Executive Order 8985 (3 CFR, 1941 Supp., p. 323) on 19 December 1941. This Executive Order listed three items as its legal foundation:

(a) Constitutional powers of the President (nothing specific mentioned).

(b) Authority vested in President by "the statutes of the United States" (nothing specific mentioned).

(c) Particularly the authority vested in the President by Section 303 of the "First War Powers Act" of 18 December 1941 (55 Stat. 838; 50 USC App. 618). This Act specifically authorized an Office of Censorship.

3. The Office of Censorship was terminated by Executive Order 9631 (3 CFR, 1945 Supp., p. 121) on 28 September 1945.

4. On 25 July 1947, Congress repealed Section 303 of the "First War Powers Act," thus removing the specific legal justification for an Office of Censorship.

5. However, the President's Constitutional powers remain as a possible foundation for reviving the Office of Censorship.

President Roosevelt evidently construed his Constitutional powers as sufficient to impose censorship or he would not have listed such powers as a basis for his Executive Order. Presumably he was speaking of the President's power as Commander-in-Chief of the armed forces, since his authority is supreme insofar as actual military operations are concerned. During World War II, President Roosevelt made the following statement:

"This total war. . . makes the use of executive power far more essential than in any previous war. . . . I cannot tell what powers may have to be exercised in order to win this war. . . . When the war is over the powers under which I act will automatically revert to the people to whom they belong". Radio Address, 7 September 1942.

This speech may sound a bit dictatorial but it shows how far a powerful executive may go.

6. In addition to the Constitution, Executive Order 8985 listed "the statutes of the United States" as a basis for imposing censorship. The implication is that the President believed there were provisions of law, other than the "First War Powers Act," upon which censorship could be based. Possibly he referred to Section 606 of the Communications Act of 1934 (47 USCA 606, as amended), which provides that the President has certain war powers over any and all wire facilities within the jurisdiction of the United States. The general import of this statute is to provide priorities for messages sent by the Government, but according to one authority its meaning is far greater. Professor Weaver, in "Constitutional Law and its Administration," made the following statement:

"The extent of the powers here defined is not clear, but under them the President enforced a strict censorship in World War II and provided for a system of priorities which he deemed necessary for national defense and for the successful prosecution of the war" (1946 Edition, p. 189).

While I am not convinced that World War II censorship was based on this statute, Professor Weaver's statement does indicate the broad power given the President by this law.

7. The power of the President in time of war (in addition to his powers as Commander-in-Chief of the armed forces) is explained in this quotation from Willoughby:

"The Constitution makes no specific provision for the exercise by the President of exceptional powers in time of war, but the fact is none the less true that, in time of war, he is enabled to exercise his specifically given powers more vigorously than in time of peace, and Congress is, as a matter of expediency, compelled to grant to him wide discretionary statutory powers" (Section 669, Constitutional Law of the United States, Second Students Edition, 1938).

8. In summary, there are three possible methods for creation of an Office of Censorship:

(a) Creation by Executive Order, based upon the President's Constitutional powers as Commander-in-Chief of the armed forces. This would be possible from a legal standpoint, but very likely would not be attempted for political and practical reasons.

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(b) Creation by Proclamation of the President that there exists a state or threat of war involving the United States, basing his action upon the Communications Act of 1934. While Professor Weaver considers this Act sufficiently broad for censorship, I do not believe Congress intended to confer such extensive powers.

(c) Creation by Executive Order based on legislation similar to the "First War Powers Act". This, of course, would be the ideal situation. It would insure Congressional support for censorship and also provide punishment for violation of censorship laws and regulations.

STATINTL



Regulations of the Office of censorship are set forth in 16 CFR 1945 Supp., p. 3536.

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